IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,	)	
Petitioners,	)	
v.	)	No. 06-2943
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

OPPOSITION OF INTERVENORS CTIA AND T-MOBILE USA, INC. TO EMERGENCY MOTION FOR STAY PENDING REVIEW

Ian Heath Gershengorn
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
IGershengorn@jenner.com

William T. Lake
Lynn R. Charytan
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
William.Lake@wilmerhale.com

Michael F. Altschul
CTIA – THE WIRELESS ASSOCIATION®
1400 Sixteenth Street, N.W.,
Suite 600
Washington, D.C. 20036
(202) 785-0081

Attorneys for CTIA – The Wireless Association

Thomas J. Sugrue
Kathleen O'Brien Ham
Patrick T. Welsh
T-MOBILE USA, INC.
401 Ninth Street, N.W., Suite 550
Washington, D.C. 20004
(202) 654-5900

Attorneys for T-Mobile USA, Inc.

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INTRODUCTION AND SUMMARY OF ARGUMENT

CTIA – The Wireless Association® ("CTIA") and T-Mobile USA, Inc. ("T-Mobile") hereby file their opposition, pursuant to Rules 18 and 27 of the Federal Rules of Appellate Procedure, to the Emergency Motion for Stay Pending Review filed by Council Tree Communications, Inc. ("Council Tree"), Bethel Native Corporation ("BNC"), and the Minority Media and Telecommunications Council ("MMTC") (collectively "Petitioners").[1/]

Petitioners ask the Court to do what courts have often been asked to do but have done only once in the history of FCC spectrum auctions—stay a major auction of spectrum licenses because some potential bidders are unhappy with the auction rules.[2/] Nothing in the petition justifies that extraordinary result.

1/ Emergency Motion for Stay Pending Review (filed June 7, 2006) ("Motion for Stay").

2/ The only time a court has stayed an FCC auction was to await a then-pending Supreme Court decision that would control the lawfulness of minority preference rules. *See Telephone Elecs. Corp. v. FCC,* No. 95-1015, 1996 U.S. App. LEXIS 4942 (D.C. Cir. Mar. 15, 1995). In all other circumstances, the courts have uniformly denied stay requests. *See Fresno Mobile Radio, Inc. v. FCC,* 165 F.3d 965, 968 (D.C. Cir. 1999); Order, *PLMRS Narrowband Corp. v. FCC,* No. 92-1432 (D.C. Cir. Aug. 14, 1998); Order, *SouthEast Telephone, Inc. v. FCC,* No. 98-1555, 1998 U.S. App. LEXIS 33937 (D.C. Cir. Dec. 4, 1998); Order, *Mountain Solutions, Ltd., Inc. v. FCC.*, Nos. 98-1503, 99-1107, 1999 WL 229027 (D.C. Cir. March 22, 1999); Order, *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. v. FCC,* Nos. 00-1402, 00-1403 (D.C. Cir. Nov. 13, 2000); Order, *Urban Comm-North Carolina, Inc., v. FCC,* No. 00-1430, 2000 U.S. App. LEXIS 35404 (D.C. Cir. Dec. 4, 2000) (dismissed as moot); Order, *In re Central Wyoming College and State Board of Education, State of Idaho,* No. 02-1191, 2002 U.S. App. LEXIS 12184 (D.C. Cir. June 18, 2002); Order, *In re Ameer Flippin,* No. 05-1026 (D.C. Cir. Jan 25, 2005); *see also FCC v. Radiofone, Inc.,*

Petitioners fail to show any likelihood of prevailing on the merits. Petitioners' principal challenge is that the Commission violated 47 U.S.C. § 309(j) because it "effectively scuttled" DE financing when it modified its DE rules to prevent fraud in auctions and deter "'participation in the licensing process by those who have no intention of offering service to the public.'"[3/] But that contention (which the FCC expressly refuted, *Second Report and Order* ¶ 39) strikes at the core of agency deference—asking the court to rebalance the manifold statutory objectives reflected in section 309(j). Nothing in section 309(j) directs the Commission to advance the interests of DEs at all costs, let alone the interests of particular DEs. To the contrary, in the context of spectrum auctions, Congress told the Commission to advance a number of critical (and often conflicting) objectives, including promoting "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays" and preventing "unjust enrichment" in the dissemination of spectrum licenses.[4/] Here, the FCC expressly struck what it viewed as the proper

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516 U.S. 1301 (1995) (stay by Sixth Circuit on Oct. 18, 1995 vacated by Supreme Court on Oct. 30, 1995).

3/ Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 4753 ¶ 3 & n.9 (2006) ("*Second Report and Order*") (quoting H.R. REP. NO. 103-111, at 257-58 (1993)); *see* Motion for Stay at 11.

4/ 47 U.S.C. §§ 309(j)(3)(A), (C).

balance.[5] Petitioners' disagreement with that balance provides no basis for judicial intervention.

Nor are Petitioners' notice concerns of any moment. In seeking comment on the DE problem that Council Tree itself had flagged, the *Further Notice* not only invited commenters to address Council Tree's proposed solution, which was to limit DE relationships with major wireless carriers; it also proposed other possible rule changes, asking whether it should limit the relationships that DEs may have with other communications companies and "additional entities."[6] The Commission further asked about the time period over which unjust enrichment penalties should apply in the event any DE loses eligibility for its bidding credits.[7] Petitioners' proclaimed surprise that the new DE rules address these points is belied by the fact that they themselves—along with other commenters—discussed these issues in their rulemaking comments. Petitioner MMTC actually advocated one of the changes it here challenges.

Equally unavailing is Petitioners' discussion of the equities, which is woefully incomplete. As the Commission has indicated in many contexts, and as many of CTIA's members have made clear throughout these proceedings, going

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[5] *Second Report and Order* ¶¶ 12, 40.

[6] Further Notice of Proposed Rulemaking, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 1753, 1763 ¶ 19 (2006) ("*Further Notice*").

[7] *Id.* at 1763 ¶ 20.

ahead with Auction 66 in a timely manner is essential to the deployment of advanced wireless services. T-Mobile and CTIA's other members stand ready to put the new AWS licenses to use immediately to provide such services, and to deploy spectrum which (as several Commissioners recognized) is "desperately needed" to upgrade a network infrastructure that "lags dramatically behind other industrialized nations" and to provide service in "underserved rural regions of our country."[8/]

Against this substantial interest, petitioners offer only the bare complaint that the new rules have impeded their securing adequate financing. But neither entity provides any evidence that it actually would have obtained financing if the rules had not been changed, or—more to the point—that the revised rules have denied financing to DEs that plan to provide their own facilities-based services to consumers, which is what the FCC reasonably chose to encourage.[9/] As to Petitioners' assertion that the Commission left them inadequate time to secure financing, Petitioners expressed no such concerns about timing when they themselves advocated major changes in the rules and then strenuously urged the

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[8/] Order on Reconsideration of the Second Report and Order, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, FCC 06-78 (rel. June 2, 2006) ("*Order on Reconsideration*") (statement of Commissioner Michael J. Copps).

[9/] *Second Report and Order* ¶ 27; *Order on Reconsideration* ¶¶ 39-40.

Commission to adopt those rules without delaying the auction.[10/] Only when the rules were changed in ways Petitioners did not like did Petitioners' concerns about timing come to the fore. The FCC was thus entirely correct to invoke the so-called "chutzpah doctrine."[11/] Such manipulation of the administrative and judicial process should not be countenanced.

Petitioners' request for a stay should be denied.

ARGUMENT

I. PETITIONERS ARE UNLIKELY TO PREVAIL ON THE MERITS.

A. The Commission's Adoption of the New DE Rules Was Not Arbitrary, Capricious, or Otherwise Unlawful.

Petitioners' complaints about the new DE rules boil down to displeasure that the Commission adopted different remedies for perceived infirmities in the DE program from those Council Tree proposed. The Communications Act instructs the FCC to balance two competing goals in this area—to promote "economic opportunity and competition" by involving DEs in the provision of wireless services,[12/] and at the same time to "'prevent unjust enrichment as a result of the

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10/ Reply Comments of Council Tree, filed March 3, 2006, at 18 ("[Other commenters] suggested . . . postponing the AWS auction [until] 180 days after the effective date of the new rules. The Commission should not do so.") (internal quotation marks omitted).

11/ *Order on Reconsideration* ¶ 13.

12/ *See* 47 U.S.C. § 309(j)(3)(B).

methods employed to issue licenses.'"[13/] Striking a balance between those statutory goals lies quintessentially within the FCC's informed discretion as it evaluates market conditions and the lessons from prior auctions.[14/] There can be no serious doubt that the balance struck in the *Second Report and Order* is one that the agency could reasonably choose.

Finding a way to encourage auction participation by DEs without fomenting abuses has been problematic. Many observers—including Petitioners—have asserted that the old rules allowed non-DEs to use the DE program to their own advantage, reaping DE benefits by partnering with DEs that had no real commitment to provide services or enhance competition.[15/] The Department of Justice has alleged instances of outright fraud in connection with the Commission's DE program and strongly advocated that the DE rules be tightened.[16/] Council

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13/ *Second Report and Order* ¶¶ 7-8 (*quoting* 47 U.S.C. § 309(j)(4)(E)); *see also id.* (statement of Commissioner Copps) (expressing need to deter "those who try to twist the rules in order to gain unwarranted entry into these programs").

14/ *E.g.*, *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999).

15/ *See, e.g.*, Ex Parte Submission of the U.S. Department of Justice, Mar. 17, 2006, at 4-5 ("DOJ Ex Parte"); Comments of Dobson Communications Corporation, filed Feb. 24, 2006 at 2 ("Dobson Comments"); Reply Comments of Cingular Wireless LLC, filed March 3, 2006, at 2 ("Cingular Reply Comments").

16/ *See, e.g.*, John R. Wilke, *Gabelli, U.S. Discuss Settlement In Fraud Case*, Wall Street J., June 1, 2006, at A3; DOJ Ex Parte at 3; *see also* Ex Parte Filing of Council Tree Communications, Inc., Jan. 11, 2006, at 3 (referencing pending litigation alleging that "yoga instructors and basketball players" were acting as "DE fronts").

Tree proposed a particular solution—to deny bidding credits to any DE that enters into a "material relationship" with a large incumbent wireless carrier.

While CTIA, T-Mobile, and others disagreed, arguing that the preexisting DE program (perhaps with enhanced enforcement) was appropriately structured,[17] the Commission was persuaded that the rules should be changed. It chose a solution different from the one Council Tree advocated, although a critical part of the FCC's solution was expressly proposed by petitioner MMTC.[18] In striking its own balance between the statutory goals, the Commission concluded that the record did not support an absolute ban aimed at a discrete category of wireless entities, as proposed by Council Tree. Instead, the Commission decided that the objectives of the DE program would be better served by placing limits on the relationships of DEs with any nonqualified companies, and by extending the unjust enrichment reimbursement period for DEs that lose their eligibility.[19]

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[17] *See, e.g.*, Comments of CTIA – The Wireless Association®, filed Feb. 24, 2006, at 7-10 ("CTIA Comments"); Comments of T-Mobile USA, Inc., filed Feb. 24, 2006, at 6-12 ("T-Mobile Comments").

[18] Comments of Minority Media and Telecommunications Council, filed Feb. 24, 2006, at 15 ("[T]he Commission should consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years . . . .") ("MMTC Comments").

[19] *See Second Report and Order* ¶¶ 3-4 ("These definitions of material relationships are necessary to strengthen our implementation of Congress's directives with regard to designated entities . . . and modifications to strengthen our unjust enrichment rules [will] better deter entities from attempting to circumvent our designated entity eligibility requirements . . . .").

There is no basis for Petitioners' contention that these new DE rules are arbitrary, capricious, or otherwise unlawful. To be sure, the new restrictions on relationships and the ten-year unjust enrichment penalty period may curtail the ability of some DEs to obtain financing, but that will not be the case for all DEs. To the contrary: Those DEs that intend to enter and stay in the market as facilities-based providers of retail services are likely to find their ability to raise capital enhanced. Moreover, the Commission's legal authority to revise the rules as it did is beyond serious question. Council Tree can hardly object to a rule restricting non-DE use of DE-licensed spectrum, given that Council Tree based its initial proposal on the assertion that large wireless carriers were unlawfully benefiting from their use of DE licenses.[20/] The FCC clearly has authority to ensure that its DE program is not being abused, and, if anything, the FCC's solution quite specifically targets the problem Council Tree identified.[21/]

20/ Comments of Council Tree Communications, Inc., filed Feb. 24, 2006, at 21.

21/ Moreover, Petitioners mischaracterize the *Second Report and Order* when they claim that a 25 percent lease or resale arrangement will "often" be enough to terminate a DE's eligibility for bidding credits. Motion for Stay at 7 n.11. To the contrary, the *Second Report and Order* makes clear that a lease or resale of 25-to-50 percent of a DE's spectrum capacity to a non-DE simply makes that interest "attributable" to the applicant "for the purposes of determining [its] eligibility for designated entity benefits, and [] liability for unjust enrichment . . . ." *Second Report and Order* ¶ 25. Thus, even a DE applicant that intends to lease 49 percent of its capacity can still be eligible for DE benefits. More importantly, nothing in the *Second Report and Order* alters the rules permitting non-DEs, including banks, other financial institutions, and other carriers, to provide significant capital to DEs in the form of equity or debt investments, so long as they do not possess either *de jure* or *de facto* control over the DE. *See* 47 C.F.R. § 1.2110.

The FCC's new unjust enrichment rule is similarly reasonable: Although Petitioners characterize that rule as a "Ten-Year Hold Rule,"[22/] it is not a mandatory holding period. It simply states that, if a DE sells to a non-DE within the license period or ceases itself to be a qualified DE, then it loses some or all of the benefits that it received because of its DE status. Such a rule, which is designed to deter DEs from using the auction and DE benefits merely to "flip" licenses to non-DEs rather than to serve customers, is plainly a permissible balancing of the competing statutory objectives. In fact, the new unjust enrichment window occupies a middle ground between the five-year period in the immediately preceding rules and the ten-year period, with no late-term reductions, in the rules the Commission initially adopted in 1994.[23/] As Petitioners acknowledge, Petitioner MMTC actually urged the Commission to consider extending the window to the full ten-year license term.[24/]

22/ Motion for Stay at 7.

23/ Second Report and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, 2395 ¶ 264 (1994), *recon.*, Second Memorandum Opinion and Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 7245 (1994); Third Report and Order and Second Further Notice of Proposed Rulemaking, *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use; 4660-4685 MHz*, 13 FCC Rcd 374, 408-409 ¶¶ 55-56 (1997) (shortening period to five years and adopting declining payment obligation) ("*Third Report and Order*"). Petitioners thus are mistaken that the FCC has imposed a five-year repayment period for bidding credits since 1994. Motion for Stay at 5 n.6.

24/ *See supra* note 18. MMTC proposed that this issue be put out for additional comments, but the FCC was not required to do so.

B. The Commission Gave Sufficient Notice and Opportunity for Comment.

The fact that a final rule varies from a proposal, even substantially, does not void the regulations. Rather, a court will examine whether the final rule was in character with the original proposal and a logical outgrowth of the notice and comments received.[25/] In this instance, the *Further Notice* and the comments filed leave no room for Petitioners' argument that they lacked notice of the challenged rules. The rule changes to which Petitioners object are not the specific changes Council Tree proposed, but they are without a doubt a logical outgrowth of the *Further Notice*. The ultimate refutation of Petitioners' notice argument is that, as discussed below, they addressed in their own rulemaking comments each of the points on which they now say they received no notice.[26/]

25/ "In considering whether the notice was deficient because the final rule differed from the proposed rule, a reviewing court asks whether the final rule was a logical outgrowth of the rulemaking proposal and record." *NVE, Inc. v. Dep't of Health and Human Servs.*, 436 F.3d 182, 191 (3d Cir. 2006) (citing *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-446 (D.C. Cir. 1991)). A new notice is not required "before [an agency] adopts a rule which is different—even substantially different—from the proposed rule." *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977).

26/ Indeed, in contrast to Petitioners' statement that there was a "stark absence" of comments from prospective and current DEs and investors prior to the release of the final rules, the record amassed in response to the *Further Notice* includes over 120 comments, reply comments, and ex partes from such parties and others, many of which specifically discussed leasing and unjust enrichment—the issues addressed by the new DE rules. *See, e.g.*, Council Tree Comments at 54 ("Long-term de facto and spectrum manager leasing arrangements, in whatever form, create the conditions" under which a national wireless service provider may inappropriately benefit from DE spectrum); Comments of Centennial Communications Corp., filed Feb. 23, 2006, at 9 (noting that "any operating

In the *Further Notice*, the Commission asked whether it should restrict DE deals with large wireless providers as Council Tree recommended, or whether it should broaden the restrictions to apply to all "entities with significant interests in communication services"[27] and any "*additional* entities."[28] This request for comments carried much more than the required "germ" for the rule eventually adopted.[29] The *Further Notice* "apprise[d] interested parties of all significant subjects and issues involved . . . so that they [could] participate in the process."[30]

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agreements, roaming arrangements, branding, trade marking, joint marketing, or leasing relationships negotiated at less than arm's length or containing provisions other than what is common in the industry" might be evidence of improper control); MMTC Comments at 15 (suggesting Commission should consider expanding unjust enrichment standard to encompass the entire license term); *see also* Comments of STX Wireless, LLC, filed Feb. 23, 2006, at 3 n.*; Comments of The NTCH, Inc. dba Clear Talk, filed Feb. 24, 2006, at 8; Comments of Wirefree Partners III, LLC, filed Feb. 24, 2006, at 18; CTIA Comments at 4. Nor was there a "thundering chorus of objections" following the release of the final rules, as Petitioners claim. Motion for Stay at 14. Only a handful of parties other than Petitioners have submitted filings to the Commission since the adoption of the new rules. Of these, some, including T-Mobile and CTIA, have filed in support of the new rules, while others merely expressed concern that the new unjust enrichment rule might apply to previously granted licenses—an issue the Commission later clarified. *See Order on Reconsideration* ¶ 41 & n.97 (citing submission by Salmon PCS, LLC).

27/ *Further Notice* at 1763 ¶ 19.

28/ *Id.* (emphasis added); *see also Order on Reconsideration* ¶ 18.

29/ *See National Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 39 (D.D.C. 2000).

30/ *Fertilizer Inst. v. Browner*, 163 F.3d 774, 779 (3d Cir. 1998) (internal citation omitted).

Petitioners "should have anticipated that such a requirement might be imposed,"[31] as evidenced by the fact that, as noted, numerous commenters—including Petitioners themselves—did comment specifically on this point.

Indeed, in its comments in response to the *Further Notice*, Council Tree specifically opposed the enumerated alternative that the FCC adopt restrictions applicable to all communications-related businesses. Council Tree reiterated its narrower proposal, focused only on major wireless carriers.[32] At the other end of the spectrum, Dobson Communications, which is not among the Petitioners, argued that, if adopted, the prohibition should be extended to all large investors, not just to in-region wireless carriers or even to communications-related businesses.[33] Nearly all commenting parties voiced opinions about whether or to what extent the "material relationship" rules should be extended to include other parties, and it became apparent early in the proceeding that many commenters advocated a remedy different from the one Council Tree preferred.[34] The fact that the

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31 *Aeronautical Radio*, 928 F.2d at 445-46 (internal quotation marks and citation omitted).

32 Council Tree Comments at 35-41.

33 Dobson Comments at 1-3.

34 *See, e.g.*, Dobson Comments at 2 ("If it is proven true that the benefits designed for small businesses are instead being realized by large strategic investors, it surely should not matter whether that investor is an in-region incumbent wireless service provider or not."); Comments of Poplar Associates, LLC, filed Feb. 24, 2006, at 3-4 ("With respect to the question of eligibility of non-carriers, Poplar submits that it would be both impractical and inequitable to single out existing wireless carriers for eligibility restrictions."); CTIA Comments at 5-6 (arguing against limiting the class of entities with which DEs could partner);

Commission resolved that issue in a manner at odds with Petitioners' desires is of no moment under Administrative Procedure Act ("APA") precedents.[35/]

The Commission also gave clear notice of its intent to revisit the issue of the unjust enrichment period by including an "Unjust Enrichment" subsection in the *Further Notice*, in which it asked: "If we require reimbursement by licensees that, either through a change of 'material relationships' or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that we might adopt, *over what portion of the license term* should unjust enrichment provisions apply?"[36/]

Comments of Madison Dearborn Partners, LLC, filed Feb. 24, 2006, at 2 (noting that it does "not support the idea of expanding the prohibition to include designated entity relationships with other communications service providers"); Reply Comments of T-Mobile, filed March 3, 2006, at 7 (arguing that focusing only on wireless carriers would be discriminatory); Cingular Reply Comments at 2 ("Prohibiting DEs from forming 'material relationships' with four or five large wireless entities hardly solves the problem, given that DEs are free to form such relationships with the remaining Fortune 1000—some of which are substantially larger than any wireless carrier.").

35/ *See Community Television, Inc. v. FCC*, 216 F.3d 1133, 1142 (D.C. Cir. 2000) (In issuing digital television license eligibility rules that disappointed some applicants, FCC reasonably balanced competing demands for spectrum.). Petitioner's claims regarding compliance with the Regulatory Flexibility Act, as amended, 5 U.S.C. §§ 601 *et seq.* ("RFA"), lack merit. As discussed, the Commission gave sufficient APA notice of its rule changes; this notice also satisfies the RFA. The central purpose of this proceeding was to consider the treatment of small businesses in FCC auctions. Thus, it was entirely appropriate to incorporate the discussion on that topic from the *Second Report and Order*, rather than repeating it. *See Order on Reconsideration* ¶¶ 43-44.

36/ *Further Notice* at 1763 ¶ 20 (emphasis added); *see also Order on Reconsideration* ¶ 32.

Petitioners' suggestion that they were denied adequate notice that the unjust enrichment window might be changed is disingenuous at best.[37] Indeed, Council Tree's own comments expounded on this point and asked the Commission to keep the existing five-year window:

> The Commission also seeks comment over what portion of the license term should the unjust enrichment provisions apply. *See FNPRM* at ¶ 20. There is no reason to depart from the terms of Section 1.2111 in this context.[38]

And, as noted, Petitioner MMTC actually urged the Commission to consider the ten-year window MMTC now challenges. The *Further Notice* evidently asked this question in such an obvious way that Council Tree and MMTC felt compelled to offer their views on it.[39]

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[37] *See also Order on Reconsideration* ¶ 34 (noting that "the comments filed in response to the *Further Notice* demonstrate that parties did in fact understand the scope of the contemplated changes to the unjust enrichments rules.")

[38] Council Tree Comments at 58-59. Section 1.2111 of the Commission's rules contained the former five-year unjust enrichment window.

[39] Petitioners have all but abandoned the argument they made before the FCC that the new DE rules violate Section 309(j)(3)(E) of the Communications Act because they were issued too close to the short-form application filing deadline. *Cf.* Motion for Stay, at 4 n.4, 10 n.15. The FCC has repeatedly held that Section 309(j)(3)(E) applies only to "auction-specific" rules covering "mechanisms relating to day-to-day auction conduct," *see Third Report and Order* at 448 ¶ 125, not to general, substantive rules such as those governing DE participation in spectrum auctions. In any event, the Commission's rules allow DEs to add noncontrolling investors up to and throughout the auction. And the FCC has now delayed the auction for six weeks on its own motion, ensuring that Petitioners have ample time to adjust their business plans to the new DE rules, if they truly seek to do so. They have far more than the 30-day period that normally satisfies the requirements of 309(j)(3)(E), where it applies. *See, e.g.*, Fifth Report and Order,

II. THE BALANCE OF HARMS AND PUBLIC INTEREST MILITATE AGAINST GRANT OF THE REQUESTED STAY.

To show the prospect of irreparable injury, the movant bears a burden to demonstrate that the injury claimed "is both certain and great."[40/] Petitioners have not met this burden. Rather, they merely submit declarations from two of the Petitioners, BNC and Council Tree, who claim that they were in the process of finalizing agreements with investors but, as a result of the Commission's new rules, their potential investors demurred.[41/] Neither entity provides any evidence that it actually would have been able to secure financing if the rules had not been changed. BNC's belief that it "could restore some or all of the transaction on which [it was] working if the Commission made clear that the rules will not change as they apply to Auction 66 and the resulting licenses" does not demonstrate an injury concrete enough to justify the grant of the extraordinary relief Petitioners seek.[42/] And that assertion highlights the fact that Petitioners would need not merely a delay of the auction but invalidation of the new DE rules to address their alleged injury.

Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 9 FCC Rcd 5532, 5677 ¶ 223 (1994).

40/ *Cuomo v. United States Nuclear Reg. Comm'n*, 772 F.2d 972, 976 (D.C. Cir. 1985) (internal quotation marks and citation omitted).

41/ Motion for Stay, App. 1, Decl. of Anastasia Hoffman at 4 ("Hoffman Decl."); *id.*, Decl. of Steve C. Hillard at 3.

42/ Hoffman Decl. at 5-6.

Petitioners' glib assertion that other "parties . . . will suffer no harm if the status quo is maintained" is without basis.[43] Unlike BNC, which has just recently "chosen to seek opportunities in the telecommunications industry . . . to diversify the economic base from which [it] serve[s] [its] shareholders,"[44] CTIA's members, including T-Mobile, *currently* have tens of millions of wireless customers, who demand high quality, reliable, ubiquitous service—from traditional voice service to the most advanced services and technologies available (or soon to be available) in the marketplace. As numerous commenters stressed, proceeding with Auction 66 in a timely manner is essential to the deployment of advanced wireless services.[45] A stay at this time would certainly harm those who have planned adequately for participation in Auction 66 by structuring contractual and financial arrangements to comply with all of the FCC's auction rules.[46]

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[43] Motion for Stay at 19.

[44] Hoffman Decl. at 2-3. Contrary to BNC's contention, moreover, Auction 66 does not represent "a unique and crucial one-time chance for companies such as BNC to enter into the telecommunications industry." *Id.* at 4. BNC and others that are just thinking about entering the telecommunications field will have additional opportunities to purchase licenses, both at auction and in the secondary market. Indeed, because of the ten-year unjust enrichment period, DEs that win Auction 66 licenses will likely look first to other entities that qualify as DEs if they want to sell their spectrum. In addition, Congress has set a date certain—January 28, 2008—by which 60 megahertz of spectrum in the 700 MHz band must be auctioned. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

[45] *See, e.g.*, CTIA Opposition to Stay at 7 (May 11, 2006); T-Mobile Opposition to Stay at 15-17 (May 12, 2006).

[46] Petitioners criticize the rules for allegedly favoring "large incumbents," *see* Motion for Stay at 5-6, 16; however, the spectrum for sale in Auction 66 is

For similar reasons, grant of the requested stay would not serve the public interest. As the Court of Appeals for the District of Columbia Circuit has held, one highly relevant measure "by which the public interest should be gauged" is the conclusion of the administrative agency charged by Congress with determining the contours of the public interest in the relevant field.[47/] In this case, the Commission has made clear its desire to proceed with Auction 66 in a timely manner.[48/] Similarly, in declining to stay a previous auction, the Commission found that such a stay "would defeat one of the underlying policy objectives of Section 309(j), which requires the Commission to promote the 'rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays.'"[49/] Just last month the Commission denied a request for stay of Auction 65, stating that "[t]wo of the primary goals of the

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important for all entities seeking to serve their customers better, not all of which are large incumbents. T-Mobile, for example, is the smallest of the national carriers, with about half as many customers as the next smallest. It seeks additional spectrum to ensure itself the capacity to compete effectively and offer consumers innovative services and broadband applications. *See* T-Mobile Comments at 2, 4. And the Commission reasonably found that the new DE rules will promote participation by DEs that plan to provide their own facilities-based services to consumers. *Second Report and Order* ¶ 27; *Order on Reconsideration* ¶¶ 39-40.

47/ *Cuomo*, 772 F.2d at 978.

48/ *Further Notice* at 1755 ¶ 1; *see id.* (Statements of Commissioners Copps and Adelstein).

49/ Order, *Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, 17 FCC Rcd 19746, 19754 ¶ 15 (2002) ("*VHF Stay Order*") (denying petition for reconsideration of designated entity decision and for stay of auction because a stay would be contrary to Congress's intention).

Commission's auction program are to ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public without delays, and promote the efficient and intensive use of the electromagnetic spectrum. These goals can best be met by moving forward with the Auction No. 65 license assignment process and by maintaining the announced auction schedule."[50/]

The Commission's most vital public interest objective here is to ensure that essential spectrum resources are introduced into the marketplace in a timely fashion. Council Tree itself once agreed with this proposition, declaring that "the single most important aspect of this proceeding is that it not disrupt the timing or certainty of [Auction 66]."[51/] That remains a key public interest objective,[52/] despite Council Tree's abandonment of its prior position.

50/ Order, *Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC, Petition for Declaratory Ruling and Motion for Stay of Auction No. 65*, DA 06-1001, at 6-7 ¶ 16 (rel. May 9, 2006).

51/ Letter from George T. Laub, Council Tree Communications Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211, at 3 n.2 (filed Mar. 20, 2006); *see also* Council Tree Comments at 38-39 (stating that the auction "should not be delayed").

52/ *See generally VHF Stay Order*; *see also, e.g.*, Order, *Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification*, 19 FCC Rcd 20482, 20489 ¶ 20 (2004) ("[T]he Bureau must consider whether the public interest warrants a stay of the due date for the upfront payment and start of Auction No. 57. We believe that the public interest is best served by maintaining the current schedule.").

The Commission is not alone in believing that the public interest requires the auction to move forward.[53/] Congress, the President, and the Department of Commerce also have worked to ensure an auction of the AWS-1 frequencies in the summer of 2006. In particular, in December 2004, Congress passed, and the President signed into law, the Commercial Spectrum Enhancement Act ("CSEA"), which set up a trust fund for relocation of government incumbents and provided for an auction of AWS spectrum 18 months after the Commission's notice to the National Telecommunications and Information Administration ("NTIA").[54/] The Commission promptly gave the requisite notice to NTIA, stating that it would hold the AWS auction in June 2006. In August 2005, after receiving the views of carriers, manufacturers, and numerous other interested parties, the Commission issued a new band plan for the AWS spectrum.[55/] NTIA timely delivered its relocation report, with estimated costs and schedules, on December 27, 2005—allowing the auction to commence six months later.[56/] On January 24, 2006, the

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[53/] *See, e.g.*, "Court Asked to Stay AWS Auction Pending 'DE' Rules Review," TR Daily (June 8, 2006) (quoting General Counsel of the Rural Telecommunications Group Caressa Bennet to state that she hopes the stay request is denied and the auction goes forward, noting that if the stay is granted, "it's going to be a long delay, and that's going to be very unfortunate").

[54/] Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in various sections of Title 47 of the United States Code).

[55/] Order on Reconsideration, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 20 FCC Rcd 14058 (2005).

[56/] *See* NTIA Website; *at* http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm (noting that "[t]he total number of frequency assignments that will be relocated by 12 federal

Commission issued an order implementing the CSEA.[57/] The government users in the AWS-1 bands are well along in developing their plans to move off the frequencies, as anticipated by the CSEA. A stay on the eve of the auction would significantly disrupt those plans, as well as the expectations of the commercial wireless industry, NTIA, and Congress.[58/]

CONCLUSION

For these reasons, Petitioners' stay request should be denied.

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agencies is 2,240 and the cost for the relocation of Federal Government operations is estimated to be $935,940,312").

57/ Report and Order, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 891 (2006).

58/ Petitioners suggest indirectly that the Court might order that Auction 66 go forward under the preexisting DE rules. Motion for Stay at 18-19. But any such order by the Court or the agency would fly in the face of the FCC's reasoned finding that the public interest requires that those rules be revised and would undoubtedly embroil the Court and the Commission in challenges from parties who have supported the reforms embodied in the new rules.

Respectfully submitted,

Ian Heath Gershengorn
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
IGershengorn@jenner.com

William T. Lake
Lynn R. Charytan
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
William.Lake@wilmerhale.com

Michael F. Altschul
CTIA – THE WIRELESS ASSOCIATION®
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Attorneys for CTIA – The Wireless Association

Thomas J. Sugrue
Kathleen O'Brien Ham
Patrick T. Welsh
T-MOBILE USA, INC.
401 Ninth Street, N.W., Suite 550
Washington, D.C. 20004
(202) 654-5900

Attorneys for T-Mobile USA, Inc.

June 15, 2006

CERTIFICATE OF BAR MEMBERSHIP

I, William T. Lake, certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

William T. Lake

June 15, 2006

CERTIFICATE OF BAR MEMBERSHIP

I, Ian Heath Gershengorn, certify that I have filed an application for admission to the Bar of the United States Court of Appeals for the Third Circuit.

Ian Heath Gershengorn

June 15, 2006

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,	)	
Petitioners,	)	
v.	)	No. 06-2943
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1.1, CTIA – The Wireless Association® ("CTIA") and T-Mobile USA, Inc. submit the following corporate disclosure statements:

CTIA is a not-for-profit corporation organized under the laws of the District of Columbia. CTIA is the international organization of the wireless communications industry for wireless carriers and manufacturers. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

T-Mobile USA, Inc. is an indirect wholly owned subsidiary of Deutsche Telekom AG ("DT"), which is a publicly held company (NYSE:DT) organized under the laws of the Federal Republic of Germany. DT is a holding company whose subsidiaries engage in telecommunications and related businesses. T-Mobile USA, Inc., together with other of DT's wholly owned subsidiaries, comprise DT's wireless division.

Respectfully submitted,

Ian Heath Gershengorn
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
IGershengorn@jenner.com

William T. Lake
Lynn R. Charytan
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
William.Lake@wilmerhale.com

Michael F. Altschul
CTIA – THE WIRELESS ASSOCIATION®
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Attorneys for CTIA – The Wireless Association

Thomas J. Sugrue
Kathleen O'Brien Ham
Patrick T. Welsh
T-MOBILE USA, INC.
401 Ninth Street, N.W., Suite 550
Washington, D.C. 20004
(202) 654-5900

Attorneys for T-Mobile USA, Inc.

June 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2006, I caused copies of the foregoing Opposition of Intervenor T-Mobile USA, Inc. to Emergency Motion for Stay Pending Review, Corporate Disclosure Statements, and Certificates of Bar Membership to be served by e-mail and hand delivery on the parties listed below:

Samuel Feder
Lawrence N. Bourne
General Counsel
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743
Laurence.Bourne@fcc.gov

Alberto Gonzales (via hand delivery only)
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

S. Jenell Trigg
Dennis P. Corbett
David S. Keir
Philip A. Bonomo
Leventhal Senter & Lerman PLLC
2000 K Street, N.W. Suite 600
Washington, D.C. 20006-1809
strigg@lsl-law.com
Counsel to Council Tree Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council

Mary Beth Caswell